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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963

NATHANIEL SPURLARK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SPECIAL NOTE:

The judgment of the Court of Appeals which affirmed the lower court judgment; and the order denying the Petition for Re-hearing, are both contained in the joint certified record being sent to the Supreme Court along with this petition, for and on behalf of all petitioners.

Also, the certified copies of the Joint Appendix filed and used in the Court of Appeals are being sent to this Supreme Court along with this petition, for and behalf of all petitioners. 17

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No.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Nathaniel Spurlark, petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 12, 1964.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in full in the Appendix to this petition. It is reported in 327 Fed. 2d 715. It is likewise set forth in full in the certified copy of the record filed in this Court.

The judgment of the United States Court of Appeals also appears in the certified copy of the record, along with the order denying the petition for re-hearing. Both the opinion and the Judgment of the United States Court of Appeals for the Seventh Circuit, affirmed a judgment previously entered by the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1), 62 Stat. 928; and Rule 19, Section 1(b) of the rules of the Supreme Court of the United States. The judgment of the Court of Appeals was entered on February 12, 1964; and a petition for rehearing was denied on March 9, 1964.

QUESTIONS PRESENTED.

1. Whether or not the Government may produce a witness for whom it vouched, and then when the witness testified that he was before the Grand Jury accompanied by an unauthorized person, to wit: a narcotics agent, and this testimony is so favorable to the defense that a mistrial is in order, and clearly indicated,—may the Government then and there summarily take the witness off the stand; proceed to put on evidence to impeach its own witness, by attempting to show that said witness was not before the Grand Jury and is unworthy of belief on this question; and by attempting to show further that the witness did not really mean what he actually said; albeit, the witness swears that he was before the Grand Jury; that the agent was present before the Grand Jury; that while witness was testifying, his testimony was halted; he went out of the Grand Jury room, gave another statement to the agent; and then returned to the Grand Jury with the agent for the completion of his testimony.

2. Whether or not a Court of Appeals may completely disregard an assignment of error which points out approximately 100 specific instances where prejudicial error has occurred during the course of the trial, this being the very first point raised in the Court of Appeals brief of the petitioner Spurlark; and where said point was completely unanswered by the Government in brief or oral argument, and where the claim was made by petitioner in the Court of Appeals brief that the sum total of these prejudicial rulings denied him a fair trial, and denied him due process of law under the Constitution of the United States.

3. Whether or not the Government, under an indictment charging only one overall conspiracy, may prove a group of separate conspiracies without showing a connecting overall rim around the spokes which constitute such separate conspiracies. That is to say, may the Government's evidence which shows that men, engaged in the narcotics traffic, are actually and factually competitors with each other for the narcotics business and are actually stealing each other's customers; may this nevertheless sustain an inference that these narcotics competitors are engaged in a joint narcotics conspiracy, simply because each one, on one occasion only, referred to the other as his partner; particularly where the evidence also shows that they were actually business partners in a legitimate Mortician's Association, and other legitimate business enterprises; but as stated, they were competitors with each other in the narcotics field.

4. Whether or not felons, narcotics addicts, and narcotic users are, like other credible witnesses, so far presumed to tell the truth, that no cautionary instructions specifically referring to the kind and character of their testimony, should be given to the jury.

5. Whether or not defendants may be convicted of conspiring to fraudulently and knowingly import and bring into the United States narcotics drugs, without one word of evidence in the record as to importation; and without one fact or circumstance in evidence, in the record, pertaining thereto.

6. Whether or not the Government, while preparing a case for trial and while actively investigating suspected narcotics traffickers, may deliberately and intentionally destroy evidence pertaining to such case; especially where the Government had at the time of the destruction of the evidence every reason to believe—based upon its investigation—that an indictment would be returned and that the case would proceed to trial, and that the evidence could be introduced.

7. Whether or not the Government may characterize a person in an indictment as a co-conspirator but not a co-defendant, and thus obtain the benefit of testimony which would otherwise be hearsay and clearly incompetent, except that it be given by a co-conspirator; where all the evidence shows that said person was not a co-conspirator.

8. Whether or not statements which ought to be furnished under Section 3500, are deliberately destroyed, and the witness who gave the statement is still allowed to testify over objections and motions to strike, simply because the Government agent who wrote up the statement elects to characterize the statement as "sketchy notes", unintelligible to anyone except the agent; but where the evidence shows conclusively that anyone of ordinary intelligence would understand said so-called "sketchy notes".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provision involved herein is the "due process" clause of the Fifth Amendment to the United States Constitution.

The statutory provisions involved are to wit: Section 174, Title 21 U.S.C.A., as amended by the Narcotic Control Act of 1956; and Section 3500 of Title 18 U.S.C.A. These provisions are set forth verbatim in the Appendix.

STATEMENT OF THE CASE.

Nathaniel Spurlark, Dennis Green, Gladys Davis, Arthur Faulkner, Jr., and Edward R. Gayles, were indicted September 2, 1959 by a Federal Grand Jury. The trial in the district court lasted thirteen days and all defendants were found guilty.

The witnesses against Spurlark testified that either Spurlark, or Katie Lewis or Gladys Davis or Willard Jones, all working under Spurlark, sold narcotics to them. The Government's evidence likewise showed that Spurlark, Green and Faulkner were partners in a Morticians' Underwriters Association which financed burials, and was legitimate in every respect. That Green likewise sold narcotics, according to the evidence, to Evans and to Faulkner.

The Government's evidence then showed that Green was trying to outbid Spurlark for Wilson's business; and was deriding the quality of Spurlark's merchandise, because Spurlark watered down his product more than did Green (App. 95). And at the same time, Spurlark was competing with Green endeavoring to outbid Green for Evan's business, with Spurlark praising his narcotic commodities over Green's (App. 230).

During the trial Government witness Evans testified that he appeared before the Grand Jury; that narcotics agent Valentine was in the Grand Jury with him. He first said he believed that Valentine was there, but was not sure; then he said "Yes, he was there." (App. 258). The evidence further was that Valentine took Evans out of the Grand Jury Room; took a second statement from Evans; and returned into the Grand Jury room with Evans (App. 258. At this point, Evans was withdrawn by the Government from the witness stand for the time being and Agent Valentine was called and testified that he, Valentine, was not in the Grand Jury Room on either occasion, nor at any time when any witness was testifying in the Grand Jury Room (App. 263-624).

Of those who testified, the key prosecution witnesses had been convicted of various felonies, or were users of narcotics, or both. For example:

Noble R. Thigpen was a felon and a user of narcotics as recently as three months before his testimony on the witness stand (App. 53, 63). Woodrow Wilson was a felon and trafficker in narcotics and smoked marijuana (App. 103-104). Mrs. Elaine Wilson said she and her husband smoked marijuana (App. 131). William Smith was a felon and convicted narcotics peddler (App. 189-190). Charles Price Webb was a convicted felon, for involuntary manslaughter and burglary (App. 191). Minnette Maljohn had served time on four felonies and had been convicted of so many felonies, she could not remember them (App. 198). Willard Evans had previously been an addict (App. 227); used heroin in his veins as recent as a couple of months before his testimony on the witness stand (App. 256); and he burglarized a grocery store after he made his statement to the Government (App.

268). Also he used heroin on the day two years earlier when he made his statement to the Government agent; and also the night before the statement, as well as the day before his Grand Jury appearance (App. 271). Rouzer was a felon, serving time for narcotics possession and had been convicted once for narcotics conspiracy, a felony. He purchased cocaine and used some, sold some and gave some away (App. 301, 302).

The Government's evidence further showed that Willard S. Evans, the Government witness, made two statements whereas the Government only furnished one statement under Section 3500 (App. 247, 254, 257; 298-300).

Government witnesses Philip R. Smith and Bernard A. Theisen testified to the making of notes first, and a statement thereafter. They did not produce the notes which were characterized as "sketchy notes". (App. 132-148, especially 142).

The evidence likewise showed that the Government destroyed many exhibits about which witnesses had testified. Objections were made to the introduction of any evidence, by way of Stipulation or otherwise, concerning destroyed evidence; and further objection was made that the Government regulations for destroying evidence was not followed (App. 160; Tr. 918-929).

Moses Winston Mardis testified that his connection with Spurlark consisted of wanting to borrow money from Spurlark to enter the bail bond business, a purely legitimate undertaking; that there was nothing illegal in the whole case that he participated in or discussed or had anything to do with (App. 222).

The evidence for the petitioner Spurlark was that his reputation for being a peaceable and law abiding citizen for over the past twenty years was good (App. 374-376); that Spurlark was neither prosecuted for nor convicted of any of the activities testified to by Agent George William Abraham (App. 378).

It was further shown that Spurlark was a legitimate Taxi-cab owner (App. 185); that he was likewise a legitimate automobile salesman (App. 247).

REASONS FOR GRANTING THE WRIT.

Certiorari is prayed for on five basic grounds, each of which will be concisely developed hereafter.

1. The Court of Appeals has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Court of Appeals itself has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The Court of Appeals itself has decided an important federal question in a way in conflict with the applicable decisions of this Court.

4. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

5. The Court of Appeals has decided three important questions of federal law which have not been, but which should be, settled by this Court.

I.

THE COURT OF APPEALS HAS SO FAR SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This proposition presents a case of very first impression, in so far as diligent research on our part has brought forth, and is therefore of the utmost importance. Nowhere have we been able to find any case remotely

resembling the case at bar under this point, and we urge this Court to say that the Government may not first vouch for a witness, then put that witness on the stand and ask the jury to believe the testimony of such witness so long as it convicts the defendants; and then when the witness says that he and an unauthorized agent were before the Grand Jury and had thus given evidence favorable to the defendants—it is our earnest contention that the Government may not then stop the trial temporarily, proceed to rebut and impeach its own witness for whom it has just vouched; and ask the Court and the jury to disbelieve the witness on the one fundamental point which was beneficial to the defendant.

This was a fundamental departure, by the lower court, from the accepted and usual course of judicial proceedings; and it was sanctioned by the Court of Appeals and apparently was considered by the Court of Appeals to be so insignificant that no mention thereof was made in the opinion. The exercise of the Supreme Court's power of supervision is called for in this case. As has been said:

> "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach.
>
> * * *
>
> "Nor does it avail respondent to contend that the defendant's guilt was clearly established.
>
> * * *

The doctrine must never be adopted in America that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade the court of defendant's guilt.

II.

THE COURT OF APPEALS ITSELF HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The brief of Spurlark in the Court of Appeals earnestly urged under his first point that he had not received a fair and impartial trial in violation of his constitutional rights, because of the many prejudicial errors at the trial. Approximately 100 of such prejudicial errors were pointed out covering thirteen pages of the printed brief. The Government in its brief did not answer nor challenge this assignment of error. And the Court of Appeals simply ignored it; thus departing so far from accepted and usual judicial proceedings as to call for an exercise of this Court's power of supervision.

In *Alford* v. *U.S.*, 282 U.S. 687, wherein the trial court erroneously limited cross examination, the reviewing court reversed. In *Krulewitch* v. *U.S.*, 336 U.S. 440, where hearsay testimony abounded as in the case at bar; and in *Mayola* v. *U.S.*, 71 F 2(d) 65 where acts, activities and conversations, not being in furtherance of the common design, were admitted into evidence as in the case at bar, all constituted reversible error. See also *Bollenbach* v. *U.S.*, 326 U.S. 607, at 614-615; and *U.S.* v. *Cirmo*, 267 F. (2d) 345.

A reading of the opinion of the Court of Appeals in conjunction with the brief of the Government filed in the Court of Appeals, is very disturbing. It appears that the Court of Appeals analyzed and discussed only the points raised in the brief of the Government; and it further appears that where the Government ignored a

point made by one of the defendants; or where the Government did not condescend to answer the defendant's arguments, then in these cases the Court of Appeals followed the Government's brief and likewise declined to discuss our assignments of error and declined to give to the defendants the benefit of the judgment of the Court of Appeals on these questions. Due process of law, or just plain fairness, demands that the defendants be given the benefit of the decision of the Court of Appeals—independent of whether or not the Government condescends to answer the defendant's argument. The defendants have not been accorded due process of law by the assertion in the last paragraph of the opinion that various other errors have been considered but found to be without substance. Constitutional questions are matters of substance; and this is true even if the decision should be against the defendants; constitutional questions are still matters of substance. Repeating, due process demands that they not be brushed aside with the assertion that they have been considered but are without substance.

III.

THE COURT OF APPEALS ITSELF HAS DECIDED AN IMPORTANT FEDERAI QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

There is more than one conspiracy in this case if the Government's evidence is true. And they emanate, if the Government evidence be true, as spokes from two hubs instead of one hub. One hub is Spurlark on the South Side and the other is Green on the West Side; but there is no overall rim around these spokes as they come out from either hub.

In *Kotteakos* v. *U.S.*, 238 U.S. 750 at page 775, it is held:

> "As the government put it, the pattern was 'of separate spokes meeting in a common center' though we may add, without the rim of the wheel to enclose the spokes.
>
> "The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment."

Also see *Kotteakos* v. *United States*, 336 U.S. 440.

IV.

A COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

The Court of Appeals in the case at bar has held that it is not necessary to give any kind of cautionary instructions which particularly call to the attention of the jury the fact of narcotic addiction or narcotic use or conviction of felony; and the Court of Appeals opinion assumes that felons and narcotic addicts and narcotics users are, like other decent respectable citizens, presumed to tell the truth. However, in *Fletcher* v. *U.S.*, 158 Fed. 2nd. 321 (D.C. Cir. 1946), the Court, at page 322, held in regard to a narcotic addict:

> "No other motive than his own advantage impelled him in all that he did, and when to this is added the well recognized fact that a drug addict is inherently a perjuror where his own interests are concerned, it is manifest either that some corroboration of his testimony should be required or at least that it should be received with suspicion and acted upon with caution."

The opinion in the case at bar refers to the above expression as "dictum". Dictum or not, it is sound, rational and pointedly correct; and this Court should unhesitatingly reconcile the two conflicting Court of Appeals opinions; and we therefore ask the Court to disregard the opinion in the case at bar which holds that this fundamental truth, cited above, is mere dictum; but on the contrary, we ask this Court to say that it is sound law and that the jury ought to have been so told.

V.

THE COURT OF APPEALS HAS DECIDED THREE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

One of the allegations in the indictment was that defendants conspired to fraudulently and knowingly import and bring into the United States narcotic drugs knowing them to have been imported and brought into the United States contrary to law. We assigned as error in the Court of Appeals, the fact that no evidence nor any facts or circumstance in regard to importation was found in the record. The Government did not answer this assignment of error, and the Court of Appeals simply ignored it. It was also raised by co-defendant Green; and went unanswered and ignored. In the absence of any testimony concerning importation of the narcotics, either legal or illegal, we may guess that the Government relied upon the presumption which is allowable by the statute in some cases but which presumption standing by itself without any evidence of importation or without any fact or circumstance in regard thereto supporting the presumption, or on which to base the presumption, certainly is not a substitute for proof beyond a reasonable doubt that the defendant conspired to fraudulently and know-

ingly import the drugs into the United States. *United States* v. *Massiali*, 307 F. 2d 62 (1962); *Kalous* v. *U.S.*, 9 F 2nd 368 at 370.

The Statute makes possession prima facie evidence for the Government, but we earnestly urge that it was never the Congressional intent to make physical possession prima facie evidence of a conspiracy. A conspiracy being an agreement, there need never be any possession involved in order for two or more people to verbally agree or to agree by acts and conduct. Congress never had this intent in mind and on this point this is a case of first impression.

Next we claim prejudicial error was committed in the destruction of exhibits. While preparing this case for trial, and collecting exhibits all over the middle west in the course of its investigation, the Government then destroyed most of the exhibits which, in fairness should have been preserved and made available for inspection by counsel for the defendants preparatory to cross examination regarding them. This was necessary in the interest of protecting the defendants. It is earnestly contended that this conduct does not meet that standard of fairness which is essential to due process of law; and that this kind of conduct offends one's sense of fairness and justice, as those terms are understood in English speaking countries. The question as to whether or not the Government may spend years collecting exhibits for use in a criminal prosecution, and then destroy them before trial has not been determined by this Court as far as we can find by diligent research; and so the Supreme Court should settle this question for all time. It is highly significant that the Government did not introduce into evidence the rules and regulations pertaining to destruction of exhibits, so that the defendants

on trial for their liberty would know that they had been accorded due process of law in the destruction of evidence; evidence upon which they could lose their liberty. In other words, the administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach; and a defendant in a criminal case must know that he has had a fair trial; or at least no reasonable grounds should exist from which he could conclude that he has not had a fair trial. And a defendant has not had a fair trial where his Government destroys, before trial, the evidence which he might explain so satisfactorily that it would prove his innocence. This too is a case of first impression.

Finally, under Section 3500, a defendant is entitled to inspect statements that are made by witnesses against him. This is axiomatic. In the case at bar, the witness Phillip R. Smith testified that he made "sketchy notes", and that no one else could understand them. On cross examination it appeared that these "sketchy notes" which he deliberately destroyed contained names of customers, addresses where the witness Elaine Wilson resided, trips that she had made, her source of supply, and the quantities she purchased—all of which were named on the document which was characterized as "sketchy notes" and which any person of normal intelligence would understand. He had planned to reduce these "sketchy notes" to writing and to offer it to the witness for her signature, but he did not recall and did not believe that he had carried out his plan. He never did say under oath that he had or had not carried out his plan (App. 143-145).

Petitioner Spurlark hereby adopts every argument, every question presented, and every reason for granting the writ, that has been urged in the petitions filed in this Court by his co-defendants.

CONCLUSION

The judgment of the Court of Appeals which affirmed the lower court judgment; and the order denying the Petition for Re-hearing, are both contained in the joint certified record being sent to the Supreme Court along with this petition, for and on behalf of all petitioners.

Also, the certified copies of the Joint Appendix filed and used in the Court of Appeals are being sent to this Supreme Court along with this petition, for and on behalf of all petitioners.

Because of the above, petitioner earnestly prays that the Writ be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NOS. 13849-13853

SEPTEMBER TERM, 1963 JANUARY SESSION, 1964

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DENNIS GREEN, *Defendant-Appellant.* — No. 13849	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GLADYS DAVIS, *Defendant-Appellant.* — No. 13850	
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ARTHUR FAULKNER, JR., *Defendant-Appellant.* — No. 13851	
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. EDWARD R. GAYLES, *Defendant-Appellant.* — No. 13852	
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. NATHANIAL SPURLARK, *Defendant-Appellant.* — No. 13853	

FEBRUARY 12, 1964

Before HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge*. Appellants appeal from their conviction, by a jury, after a thirteen day trial on an indictment charging a conspiracy to violate the narcotics law.[1] The five appeals were consolidated in this court.

In deciding the issue whether there was evidence upon which the jury could infer guilt of defendants beyond a reasonable doubt, we must take the testimony and reasonable inferences most favorable to the government. *United States* v. *Glasser*, 315 U. S. 60, 80 (1942). *United States* v. *Miccle*, ... F. 2d ..... (7th Cir. Nos. 14145-49, January 8, 1964).

Thigpen,[2] at defendant Spurlark's direction, purchased narcotics from Katy Lewis from 1951 through 1956. After her death in 1956 Spurlark directed Thigpen to purchase from defendant Willard Jones.[3] In 1958 Spurlark directed him to pick up narcotics from defendant Gladys Davis. In 1958 Thigpen twice sold narcotics received from Spurlark to Narcotics Agent Bailey. From 1952 to 1955 witness[4] Wilson purchased narcotics from Spurlark and Lewis. He also arranged for his wife to purchase from them. Later Wilson bought narcotics from defendant Green and Green told him "you know Teo [Spurlark] and I are in business together * * * my partner." Witness William Smith purchased narcotics from Spurlark in 1953 and 1954 and thereafter from Katy Lewis until her death. After her death, Smith, at Spurlark's direction, bought narcotics from Jones and then from Gladys Davis. From 1952 to 1954 Evans[5] bought narcotics from Green, and later from Spurlark and Katy Lewis. In 1955 Spurlark told witness Mardis that he was putting Green "in charge of all activity on the west side."

In 1955, in a conversation at which Evans, Green, Spurlark and Mardis were present, Evans was told Green was

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[1] A conspiracy in violation of 21 U. S. C. § 174.

[2] An unindicted co-conspirator.

[3] Appellant in No. 13854, not consolidated with these causes.

[4] "Witness," as used in this opinion, designates those who are neither defendants nor unindicted co-conspirators and who testified at the trial.

[5] An unindicted co-conspirator.

to take over the sale of narcotics on the west side. Late in 1955, with Green's permission, Evans and defendant Faulkner "combined" their business for the sale of narcotics on the west side for a few months. In June of 1956 Faulkner and Spurlark brought narcotics back from New York to relieve a "shortage" in Chicago. Evans purchased narcotics from Green from 1955 to 1959 except for a two month period when, in Green's absence, he bought from Faulkner.

Witness Rouzer of Detroit made several purchases from Spurlark in 1955. In 1958, at Spurlark's direction, Rouzer twice went to Gladys Davis' apartment to await narcotics deliveries. And twice Spurlark sent Gladys Davis to Detroit to get money from Rouzer for Spurlark.

It is needless to detail more of the testimony which amply justified the jury in the inference that at the center of this narcotics web was Spurlark, holding it together, and operating from the Rodeo Lounge on Chicago's south side, through Dennis Green, Evans and Faulkner on the west side, and through the late Katy Lewis, Jones and Gladys Davis on the south side.

The testimony against defendant Gayles, an attorney, did not link in any way with the sale or distribution of the narcotics. There is testimony favorable to the prosecution, however, and the inferences the jury could reasonably draw, to show that he was more than an attorney for the defendants; and that he knowingly participated intentionally, *Direct Sales Co.* v. *United States*, 319 U. S. 703, 711 (1943), in aiding his co-defendants, and others, from late 1954 to 1959, in carrying out their illegal enterprise: "After 1953" he was a manager, along with defendant Green, in the Morticians Underwriters Association, in which Spurlark and Faulkner had made investments. Gayles was present at the meeting and conversations in his home attended by Spurlark, Wilson, and police officers who were planning the arrest of "Big John," a competitor of Spurlark's whom the latter said "some people" wanted to "bust." Gayles told Thigpen, an addict and peddler

whom he represented, that for $125 per month he could see that the police did not bother Thigpen again. Gayles told Wilson to be careful about telephones and tape recorders, and to use gloves when handling packages because the police "will be trying to get" him. Gayles told Evans and Faulkner to stay away "from around the Setup" tavern because police officers were looking for them. He told Evans that he would need "five hundred" to fix a case, after confirming that Green would vouch for the money.

There is no merit to the contention of defendants that more than one conspiracy was shown, to their prejudice, by the evidence, or that the evidence showed merely a number of unrelated episodes.[6] There is testimony to show that Spurlark, beginning in 1952, was the source from which the narcotics flowed to his south and west side minions; and that Gladys Davis, Evans and Faulkner operated to some extent on both the south and west sides of the distribution structure. The jury could infer from this evidence that each defendant knew, or should have known, of the conspiracy. *United States* v. *Poliafico*, 237 F. 2d 97 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957). It was not necessary that each co-conspirator knew all others or that each witness mention all, or that each one be involved throughout the entire span of seven years. *United States* v. *Miccle*, ... F. 2d ..... (7th Cir. Nos. 14145-49, January 8, 1964). A fluctuation of the membership during the span of this record of continuous activity cannot be compared to the facts in *United States* v. *Russano*, 257 F. 2d 712 (2d Cir. 1958), where the evidence established two conspiracies, with a break between the two. The rule in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), is not applicable here, because the evidence shows but one conspiracy with Spurlark at the center and several conspirators radiating from him. The trial court properly denied motions for severance on grounds of variance or misjoinder.

[6] For example, the sale by Spurlark to witness Minnett Malichn in 1958, who took the purchased goods to Davenport, Iowa, established that the "white powder" Spurlark was selling was heroin hydrochloride.

Since the cases of Johnson and Williams were severed during trial, there is no merit of Gayles' contention of prejudicial joinder. The court, in ruling against Gayles' proffer of testimony of his pre-conspiracy participation in arrests of co-defendants, weighed the probable prejudice to Spurlark and Green against the probable gain to Gayles from the testimony. We see no abuse of discretion in the ruling, and cannot see error in denying him a severance because he could not, otherwise, introduce the testimony.

Gayles proffered an instruction which told the jury that Gayles' representation of co-defendants for narcotics violations was insufficient to prove his participation or membership in the conspiracy. It then went on to state, in the abstract, rights and duties of attorneys[1] in defense of alleged violations of law. The trial court read this instruction as tending to direct a verdict of not guilty, and added the following cautionary paragraph:

> "You are not to infer from the foregoing however, that an attorney has any special status which permits him to perform an unlawful act, or to join an unlawful conspiracy, nor may he knowingly assist a client to commit an unlawful act or to further an unlawful conspiracy."

We cannot say the court misread the proffered instruction, nor that the modification directed a guilty verdict or otherwise prejudiced Gayles, nor that the paragraph was without an evidentiary basis.

Gayles tendered an instruction dealing generally with jury's consideration of the use of narcotics as an element

[1] "It is the right and duty of a lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion of the guilt of the accused. Otherwise, innocent persons, victims only of suspicious circumstances may be denied proper defense.

"Having undertaken such defense the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the ends that no person may be deprived of life or liberty, except by due process of the law.

"Under the law an attorney may not reveal or disclose to law enforcement agencies or to anyone, any information revealed to him by his client. And the fact that an attorney does not inform or advise law enforcement agencies of any information revealed to him by a client is not in any way to be taken or construed against said attorney."

in determining credibility. Faulkner offered an instruction naming government witness Evans as a ten-year addict prior to August, 1961, and stating his testimony should be received with "extreme caution and suspicion" and be given serious consideration only when corroborated. The court refused to give these instructions.

The court gave thorough instructions regarding credibility and weight of testimony, beginning:

> "You have heard much discussion of the question of the credibility and weight you are to give to the testimony of the particular witnesses. Let me be as explicit as I can on that."

The instruction went on to inform the jury that they were "sole judges" of credibility; that the presumption that a witness speaks the truth is rebuttable by the manner in which he testifies, the character of his testimony, or contradictory evidence; that in weighing the testimony of each witness they were to give *careful scrutiny* (our emphasis) to the circumstances of his testimony, his demeanor on the stand, his relation to the government or to defendants, the manner in which the verdict might affect him, and the extent to which he is contradicted; and that they could consider promises of immunity or hope of reward in weighing the credibility of the witness, and the effect of any false testimony they might find on other testimony of the witness. The instruction told the jury of its right to examine the evidence "closely and carefully in the light of the common knowledge and experience of mankind . . . and your own" in determining credibility.

The court was clearly correct in rejecting Faulkner's instruction naming witness Evans. And in different words the substance of Gayles' instruction was covered.

Defendants admit that Evans' history as an addict was brought out "with commendable candor" by the government and there is no complaint that cross-examination of him was unduly limited. Defendants' expert witness' opinion was that Evans testified "to the best of what

would be his normal ability," and government's expert's testimony would justify the inference that Evans had "kicked the habit" several months prior to testifying.

Fletcher v. *United States*, 158 F. 2d 821 (D. C. Cir. 1946), is distinguishable because the district court there refused to instruct the jury that the informer's testimony should receive greater scrutiny and care than the ordinary witness'. The court of appeals pinned the decision to the "facts of this case" where the testimony of the informer, addict and dope peddler, was uncorroborated and the only testimony against Fletcher. And *People* v. *Bazemore*, 25 Ill. 2d 74, 182 N. E. 2d 649 (1962), is to the same effect. The inference here could be that Evans was not an addict, that his testimony had been corroborated, and that the instruction was sufficiently cautionary. The dictum in *Fletcher* about "the well recognized fact" of an addict being "inherently a perjurer" is not pertinent. Here, under the instruction the jury knew Evans' testimony should be carefully scrutinized. The circumstances here do not fall under the reversible error test laid down by the court in *Phelps* v. *United States*, 252 F. 2d 49, 53 (5th Cir. 1958).

We see no merit in the contention that the district court committed reversible error by refusing to give the instructions tendered by Gayles and Faulkner.

The court's instruction is criticized too for stating that "a witness is presumed to tell the truth * * *" and we are referred to Judge Brown's concurring opinion in *Knapp* v. *United States*, 315 F. 2d 794 (5th Cir. 1963), where the only witnesses were government witnesses. The majority did not reverse; it did not approve the instruction on the facts there. What Judge Brown said, with no idea of reversible error, of the "presumed to tell the truth" statement was said in relation to an accompanying instruction and we think does not relate to the instruction here.

We see no need of discussing other claims of error in the giving, or refusing, of other instructions. We have

considered the claims and find that the court's instructions included in substance all proffered instructions that were proper and that the instructions given were not erroneous.

The rule in *Falcone* v. *United States*, 109 F. 2d 579 (2d Cir. 1940); *affirmed* 311 U. S. 205, does not apply to render reversible error the testimony of Wilson regarding Gayles and Spurlark, and testimony of Mardis as bondsman. Neither does the hearsay rule exception discussed in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), nor the rule in *Greenwood* v. *United States*, 353 U. S. 391, 401-04 (1957), apply to the testimony of Evans against Gayles. These items of evidence in the context of all the evidence, related above, render the rules inapplicable; the jury could conclude the events testified to were in furtherance of the conspiracy, not merely legitimate transactions; and not a "subsidiary conspiracy" of events after the alleged conspiracy ended. And we see no error in the cross-examination of Gayles about the Morticians Association and see no reversible error in the cross-examination about his trips with other men, and women not their wives.

In view of *United States* v. *Garfoli*, 324 F. 2d 909 (7th Cir. 1963), and because of what was sought, we see no abuse of discretion in the trial court's denial of Green's motion for a bill of particulars.

Various other alleged errors, asserted by the different defendants, have been considered, but we find them to be without substance. We find no reversible error as to any of the defendants.

The judgments are AFFIRMED.

APPENDIX B

AMENDMENT V, OF THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, Section 3500, UNITED STATES CODE ANNOTATED

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant), to an agent of the Government shall be subject to subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates

to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall

strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b) (c) and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Title 21, Section 174, UNITED STATES CODE ANNOTATED

174. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any kind of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 28, Section 1254, UNITED STATES CODE ANNOTATED

Courts of appeals; certiorari; appeal; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.